

No. 16017 /

United States
Court of Appeals
for the Ninth Circuit

GEORGE GILBERTSON,

Appellant,

vs.

CITY OF FAIRBANKS, a Corporation,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division.

FILED

JUL - 8 1958

PAUL P. O'BRIEN, CLERK

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THE
HISTORY OF THE
CITY OF BOSTON
FROM 1630 TO 1800

BY
JOHN H. COOPER
OF THE
BOSTON PUBLIC LIBRARY

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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THE HISTORY OF THE

REIGN OF

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BY JOHN HANCOCK

IN TWO VOLUMES

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United States Court of Appeals
for the Ninth Circuit

No. 15567

GEORGE GILBERTSON,

vs.

CITY OF FAIRBANKS.

MANDATE

United States of America, ss:

The President of the United States of America

To the Honorable, the Judges of the District Court
for the Territory of Alaska, 4th Division,
Greeting:

Whereas, lately in the District Court for the Territory of Alaska, Fourth Division, before you or some of you, in a cause between City of Fairbanks, Plaintiff, and George Gilbertson, Defendant, No. 9210, an Order was duly filed and entered on the 6th day of February, 1957; which said Order is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And Whereas, the said George Gilbertson appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of

Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 14th day of February, in the year of our Lord, one thousand nine hundred and fifty-eight, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is dismissed. (February 14, 1958.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the nineteenth day of February, in the year of our Lord one thousand nine hundred and fifty-eight.

/s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed February 21, 1958.

In the District Court for the District of Alaska,
Fourth Division

No. 9210

CITY OF FAIRBANKS, a Municipal Corporation,
Plaintiff,

vs.

GEORGE GILBERTSON,
Defendant.

MOTION FOR REHEARING AND TO REVISE
OPINION AND ORDER OF DISMISSAL
OR, IN THE ALTERNATIVE, FOR ENTRY
OF A FINAL JUDGMENT OF DISMISSAL
UNDER RULE 54(b) FRCP

1. Defendant herein, by Edgar Paul Boyko, his attorney, moves this Honorable Court for a rehearing and to revise the Opinion and Order of Dismissal of defendant's counterclaim entered herein on February 1, 1957, on the following grounds:

(a) On February 14, 1958, the U. S. Court of Appeals for the Ninth Circuit dismissed, without prejudice, defendant's appeal from said Order for the reason that said Order was not final and appealable under Rule 54(b) of the Federal Rules of Civil Procedure.

(b) Since the filing of the opinion of this Honorable Court herein on January 4, 1957, the Supreme Court of the United States, to wit, on Janu-

ary 28, 1957, decided the cases of *Rayonier, Incorporated, v. United States* and *Arnhold v. Same*, 352 U. S. 315, reversing prior judgments of the Court of Appeals for the Ninth Circuit and the United States District Court of the Western District of Washington. Defendant is advised by counsel and therefore believes that these recent decisions of the Supreme Court raise a new and substantial issue of law in the present cause and defendant therefore prays leave to submit briefs and arguments thereon at the early convenience of the Court and counsel, so that this Honorable Court may be able to fully consider this point which was not, and prior to the aforesaid decisions of the United States Supreme Court could not be presented to this Court. Also since the filing of the said Opinion and entry of said Order herein, the Legislature of the Territory of Alaska declared the law of the Territory in conformance with the said opinions of the U. S. Supreme Court, all of which defendant desires to present and argue fully before this Honorable Court.

(c) An apparent misunderstanding has arisen between plaintiff and defendant as to the intent of the Opinion and Order of this Honorable Court, referred to hereinabove, defendant believing in good faith that it was the purport of this Court to preclude any amendment of the counterclaim, so long as the same was based upon claimed liability for torts on the part of an Alaskan municipal corporation, while the plaintiff contends otherwise. If indeed it was the intention of this Honorable Court

to permit such amendment, defendant now desires to do so and requests that, in the interest of justice, the said Order be amended so as to permit this to be done.

2. In the alternative, if this Honorable Court does not see fit either to grant a rehearing or leave to amend the counterclaim as prayed above, defendant moves, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, for an Order directing entry of a final and appealable judgment of dismissal on the counterclaim for the following reasons:

(a) The said counterclaim is permissive and sets forth causes of action separate and distinct from, and entirely independent of, plaintiff's original claim and thus could have been brought as a separate action. Thus there is no reason not to separate the same for purposes of obtaining appellate adjudication of an important legal issue of first impression in the Territory of Alaska.

(b) There is no just reason for delay in entering such final judgment and once entered, the United States Court of Appeals for the Ninth Circuit has indicated that it is prepared to proceed on the original record and briefs of the first appeal herein (with appropriate supplementation) to avoid undue hardship to either party.

3. Defendant respectfully requests that in the event this Honorable Court desires further briefs and/or oral arguments on this Motion, that his

counsel, who is on extended leave of absence in the State of California, be given adequate notice to permit him to comply with the requirements of this Honorable Court and to attend any hearing which may be ordered herein.

BOYKO, TALBOT & TULIN,
Attorneys for Defendant;

By /s/ EDGAR PAUL BOYKO.

Points and Authorities

The foregoing Motion is based on Rule 54(b) of the Federal Rules of Civil Procedure, which provides in pertinent part that:

“When more than one claim for relief is presented in an action, whether as a claim (or) counterclaim * * * the court may direct the entry of a final judgment upon one or more but less than all the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order * * *, however designated, which adjudicates less than all of the claims * * * is subject to revision at any time before entry of judgment adjudicating all the claims.”

Rule 54(b) FRCP.

See also: 3 Bender's Federal Practice 434, 438, 441 (with Notes).

Respectfully submitted,

BOYKO, TALBOT & TULIN,
Attorneys for Defendant;

By /s/ EDGAR PAUL BOYKO.

[Endorsed]: Filed February 24, 1958.

In the District Court for the District of Alaska,
Fourth Division

No. 9210

CITY OF FAIRBANKS, a Municipal Corporation,

Plaintiff,

vs.

GEORGE GILBERTSON,

Defendant.

FINAL ORDER AND JUDGMENT
OF DISMISSAL

An Order having been entered herein on February 1, 1957, for dismissal of the causes of action set forth in the counterclaim of the defendant for the reason set forth in the Opinion filed hereintofore on January 4, 1957, and defendant's motion for rehearing and for an Order revising the said Opinion and Order having this day been denied; and

It appearing to this Court that there is no just reason for delay in entering final judgment of dismissal of defendant's said counterclaim and the action or actions therein set forth, it is, pursuant to

Rule 54(b) of the Federal Rules of Civil Procedure, directed, that final judgment upon said separate claims be entered; and it is, accordingly, hereby

Ordered, Adjudged and Decreed that the actions or causes of actions set forth in the first and second counts of defendant's counterclaim and the whole thereof be, and the same are, hereby finally dismissed without leave to amend.

Dated this 28th day of February, 1958, at Nome, Alaska.

/s/ WALTER H. HODGES,
District Judge.

Lodged February 29, 1958.

[Endorsed]: Filed and entered March 3, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that George Gilbertson, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Final Order and Judgment of Dismissal entered hereintofore on the 28th day of February, 1958, whereby Defendant's Motion for Rehearing and for an Order revising the Opinion and Order filed hereintofore on January 4, 1957, and February 1, 1957, respectively, was denied and the actions or causes of action set forth in the first and second count of Defendant's counterclaim and the whole thereof were finally dismissed without leave

to amend, conformably to Rule 54(b) of the Federal Rules of Civil Procedure.

Dated the 26th day of March, 1958.

BOYKO, TALBOT & TULIN,

By /s/ EDGAR PAUL BOYKO,
Of Attorneys for Appellant (Defendant) George
Gilbertson.

[Endorsed]: Filed March 28, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. Points 1 through 6, inclusive, of the statement of points filed hereintofore on April 29, 1957.
2. The Court erred in failing to take judicial notice of binding appellate precedents and legislative enactments which deprive appellee of the immunity from suit relied on in the order appealed from.
3. The Court abused its discretion in refusing to grant a rehearing and refusing to grant leave to appellant to amend his counterclaim.

/s/ EDGAR PAUL BOYKO,
Attorney for Appellant.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

1. Printed Record of previous appeal, separately bound, your number 15567.
2. Mandate dismissing Appeal.
3. Motion for Rehearing and to revise opinion and Order of Dismissal or, in the alternative, for entry of a final Judgment of Dismissal under Rule 54(b), F.R.C.P.
4. Final Order and Judgment of Dismissal.
5. Notice of Appeal.
6. Statement of Points.
7. Designation of Contents of Record on Appeal.

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the foregoing list of proceedings in this cause comprise all proceedings listed on the Designation of Record of the defendant and appellant herein.

Witness my hand and the seal of the above-entitled Court this 12th day of May, 1958.

[Seal] /s/ JOHN B. HALL,
 Clerk of Court.

[Endorsed]: No. 16017. United States Court of Appeals for the Ninth Circuit. George Gilbertson, Appellant, vs. City of Fairbanks, a Corporation, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed May 16, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

